UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 70

Docket No. DE-0752-12-0092-I-1

Andrew M. Kolenc,

Appellant,

v.

Department of Health and Human Services,

Agency.

September 11, 2013

Thomas F. Muther Jr., Esquire, Denver, Colorado, for the appellant.

Megan M. Bauer, Esquire, and Nigel Gant, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed its action removing the appellant from his position on the basis that the agency violated the appellant's due process rights.[1] The appellant moved to

[1] We have applied the Board's regulations that became effective November 13, 2012. We note that the petition for review in this case was filed before that date. However, the Board's regulations regarding interim relief were not substantively changed by the revision of the regulations.

dismiss the agency's petition for failure to comply with the interim relief order. For the reasons set forth in this Opinion and Order, we DENY the appellant's motion to dismiss, DENY the agency's petition for review, and AFFIRM the initial decision's reversal of the appellant's removal.

BACKGROUND

¶2 The agency removed the appellant from his Consumer Safety Officer position with the Food and Drug Administration (FDA) based on four charges: (1) willful misuse of a government owned vehicle; (2) misuse of a government gas card; (3) failure to provide accurate time and attendance information; and (4) failure to follow instructions. Initial Appeal File (IAF), Tab 7, Subtabs 4a, 4d. The appellant filed a Board appeal of his removal. IAF, Tab 1, Tab 1.

¶3 After conducting a hearing, the administrative judge reversed the removal on July 13, 2012, finding that the agency violated the appellant's due process rights because the deciding official considered ex parte information that constituted new and material evidence. IAF, Tab 24, Initial Decision (ID). The administrative judge further ordered the agency to provide interim relief as of the date of the initial decision and until the decision of the Board becomes final. ID at 7.

¶4 The agency filed a petition for review and submitted a certification of interim relief averring that it had placed the appellant in an interim position effective August 17, 2012. Petition for Review (PFR) File, Tab 1, Exhibit 1.

ANALYSIS

Interim Relief

¶5 The appellant timely filed a motion to dismiss the agency's petition for review for failure to comply with the interim relief order because his interim appointment was effective on August 17, 2012, rather than on July 13, 2012, as required by the initial decision. PFR File, Tab 3 at 1-2. On September 27, 2012, the agency filed a supplement to its petition for review that acknowledged its

error, but stated that on September 26, 2012, it had issued an SF-50 reflecting that it restored the appellant's pay and benefits effective July 13, 2012. PFR File, Tab 4.

¶6 On October 10 and November 8, 2012, the appellant renewed his motion to dismiss, alleging that he suffered hardship as a result of the agency's failure to issue retroactive payment, and he submitted affidavits averring that he had not yet received pay for the period from July 13, 2012, to August 16, 2012. PFR File Tabs 5, 6. The agency did not respond to the appellant's motions or otherwise address the alleged compliance issues.[2]

¶7 On April 2, 2013, the Office of the Clerk of the Board ordered the agency to submit evidence and argument responding to the appellant's assertion that, as of November 8, 2012, he had not yet received pay and benefits for the period from July 13, 2012, to August 16, 2012, and to identify the date it fully complied with the interim relief order. PFR File, Tab 7 at 2-3.

¶8 On April 17, 2013, the agency responded that it issued a corrected SF-50 on September 26, 2012, and issued payment to the appellant on November 9, 2012. PFR File, Tab 8 at 3. The agency, however, acknowledged that it still owed the appellant 32 hours of retroactive pay for the period from August 14 to 17, 2012, as "a result of confusion and miscommunication between the FDA payroll system and [the Defense Finance and Accounting Service (DFAS)] system involved in handling retroactive payments," but contended that the appellant would be paid on April 26, 2013. *Id.* at 3-5 and Ex. 1 at 3.

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[2] The agency contends that it did not receive the appellant's November 8, 2012 pleading. PFR File, Tab 8 at 4. However, the certificate of service shows that the November 8, 2012 pleading was sent via U.S. Mail to the agency's address of record, and the agency has not alleged that it did not receive the appellant's October 2012 pleading or the April 2, 2013 Order to Submit Evidence Regarding Interim Relief, which were sent to the same address. Pleadings that are properly addressed and sent to a party's address via postal or commercial delivery are presumed to have been duly delivered to the addressee. *See* 5 C.F.R. § 1201.22(b)(3).

¶9 The appellant replied on April 24, 2013, requesting that the Board should dismiss the agency's petition for review because the agency still had not effectuated the relief ordered by the July 13, 2012 interim relief order. PFR File, Tab 9. On May 24, 2013, the agency submitted evidence showing that, on April 26, 2013, it paid the appellant pay and benefits for 32 hours for the period from August 14 to 17, 2012. PFR File, Tab 11.

¶10 When an initial decision grants the appellant interim relief, any petition for review or cross petition for review must be accompanied by a certification that the agency has complied with the interim relief order. *See* 5 C.F.R. § 1201.116(a). In order to comply with the interim relief order, the agency must either provide the interim relief ordered by the administrative judge, or make a determination that returning the employee to the position designated by the administrative judge would cause undue disruption to the work environment. 5 U.S.C. § 7701(b)(2)(A)(ii) and (B). The intent of interim relief is to protect the appellant from hardship during the pendency of his appeal if he prevails in the initial decision. *Armstrong v. Department of Justice*, 107 M.S.P.R. 375, ¶ 12 (2007).

¶11 If an agency fails to establish its compliance with the interim relief order, the Board has discretion to dismiss its petition for review, but need not do so. *Guillebeau v. Department of the Navy*, 362 F.3d 1329, 1332-34 (Fed. Cir. 2004); *Stack v. U.S. Postal Service*, 101 M.S.P.R. 487, ¶ 6 (2006). Under the circumstances of this case, we exercise our discretion not to dismiss the agency's petition for review because the agency has submitted evidence to show that it has complied with the interim relief order, that its delayed compliance with the order was inadvertent, and that the shortcomings in the agency's certification of compliance were not sufficiently serious to warrant dismissal. Therefore, we deny the appellant's motion to dismiss.

Due Process

¶12 The appellant argued below that the agency violated his due process rights when the deciding official considered ex parte information in sustaining the charges. Our reviewing court has held that, when a deciding official receives new and material information by means of ex parte communications, "then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure." *Stone v. Federal Deposit Insurance Corporation*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). In *Stone*, the deciding official received ex parte memoranda recommending removal of the employee after the employee had received a notice of proposed removal. *Id*. at 1372. The court reasoned:

> The introduction of new and material information by means of ex parte communications to the deciding official undermines the public employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and the opportunity to respond. When deciding officials receive such ex parte communications, employees are no longer on notice of the reasons for their dismissal and/or the evidence relied upon by the agency. Procedural due process guarantees are not met if the employee has notice only of certain charges or portions of the evidence and the deciding official considers new and material information.

Stone, 179 F.3d at 1376.

¶13 However, the court stated:

> [n]ot every ex parte communication is a procedural defect so substantial and so likely to cause prejudice that it undermines the due process guarantee and entitles the appellant to an entirely new administrative proceeding. Only ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice.

Stone, 179 F.3d at 1376-77.

¶14 In *Stone*, the Federal Circuit relied upon the following factors in determining whether ex parte communications introduce new and material information: (1) whether the information is merely cumulative; (2) whether the

employee knew of and had an opportunity to respond to the information; and (3) whether the ex parte communications would likely result in undue pressure upon the deciding official to rule in a particular manner. *Stone*, 179 F.3d at 1377. The ultimate inquiry is whether the ex parte communication is "so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances." *Id.*

¶15 The agency contends on review that the ex parte information that the deciding official received from the fleet manager was not new and material information because it was cumulative of other information in the record, and it was obtained in response to the appellant's written reply. PFR File, Tab 1. The agency also contends that ex parte communications were not relied upon to sustain the charges or to aggravate the penalty, and it was not the type of information that would exert undue pressure upon the deciding official. *Id.* It asserts that the deciding official testified that, even without the entire fourth charge, he would have made the same decision to remove the appellant, and that the administrative judge erred in failing to perform a credibility analysis under *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987) to resolve conflicts in the deciding official's testimony. *See Thomas v. U.S. Postal Service*, 116 M.S.P.R. 453, ¶ 12 (2011); PFR File, Tab 1 at 9-10.

¶16 Under the first *Stone* factor, the court has found that "[w]hen a deciding official initiates ex parte communication that only confirms or clarifies information already contained in the record, there is no due process violation" because it does not introduce new and material information. *See Blank v. Department of the Army*, 247 F.3d 1225, 1229 (Fed. Cir. 2001). Thus, the court has recognized that a deciding official may conduct a limited inquiry into matters already in the record to clarify information that has already been received as evidence.

¶17 However, the court recently clarified the scope of such inquiries. *See Young v. Department of Housing and Urban Development*, 706 F.3d 1372, 1377

(Fed. Cir. 2013) (quoting *Blank*, 247 F.3d at 1229). In *Young*, the deciding official interviewed several witnesses concerning the appellant's charged disruptive conduct after she had received his oral and written replies to the charge. The misconduct allegedly occurred during a recess of an arbitration hearing in the area just outside of the hearing room. In his written reply, the appellant and a supporting witness denied the charge entirely and provided statements that they spent the entire recess together outside the hearing room. However, the witness later acknowledged during an interview with the deciding official that he and the appellant went to his cubicle during the recess so that he could check his email and attend to other matters. 706 F.3d at 1375. Without providing the appellant an opportunity to respond to this new information, the deciding official considered it and found that the discrepancies in the witness's statements wholly undermined his credibility and led her to conclude that the appellant engaged in the charged misconduct. *Id.* The court found that "the significant and overwhelming role that the new communication played in the termination decision makes it evident that the *ex parte* communications introduced new and material information." *Id.* at 1377. The court therefore found that the ex parte information received was "more than 'confirming and clarifying information' that was already in the record because the deciding official described the information as a 'huge' departure from the written statements in the record."

¶18 Here, the first two *Stone* factors have been met. The agency alleged in Specification 1 of Charge 4 that the appellant failed to follow instructions when he violated Denver Municipal Code 54-101(c)—Disobedience to a Traffic Signal—while in a government owned vehicle on August 19, 2011. IAF, Tab 7, Subtab 4d. In his November 28, 2011 written reply to this charge, the appellant's representative stated: "Since the photograph was taken, the city of Denver said the ticket was too old to serve and has likewise notified him that the ticket had been cancelled." *Id.*, subtab 4c. There is also evidence that, prior to the

submission of his written reply, the appellant informed his supervisor that the ticket had been dismissed. IAF, Hearing Transcript (HT), Cato Testimony at 91-92.

¶19 In the removal letter, the deciding official stated:

> In addition, you have provided no evidence that the charges have been dropped or the case has been dismissed as alleged in your written response. In fact, following your original claim that the ticked has been dismissed, the SWID fleet manager contacted the Denver Police Department on November 8, 2011, and it was reported to him that the ticket was still active and not dismissed as you alleged at that time.

IAF, Tab 7, Subtab 4b at 3. The deciding official testified that he considered the fleet manager's report that the ticket had not been canceled in sustaining the charges and admitted that the appellant had not been advised that this information was considered. *Id.*, Hearing Transcript, Cato Testimony at 91-92.

¶20 We agree with the administrative judge that the deciding official's testimony unequivocally establishes that his decision was based upon ex parte information to which the appellant did not have an opportunity to respond. Specifically, on cross examination, the deciding official testified:

> Q Okay. But needless to say, you did consider, did you not, this – Mr. Hill's inquiries with the Denver Municipal fleet or traffic section as to the status of the ticket when making your decision?
>
> A Yes.
>
> Q In fact, it was important enough to you that you included it into your analysis in Charge 4?
>
> A You raised in the response to the proposal, specifically that that ticket had in fact been dismissed. As I stated as part of my administrative function, I was aware that we could not get license plates issued for that vehicle because of a pending ticket. When Mr. – so when Mr. – when he indicated to his supervisor that the ticket was in fact dismissed, I reported that to Mr. Hill and told him to go about securing those government vehicle tags for us and he came back to me and said no. It's not been dismissed.

> Q And was that in the material that you provided to Mr. Kolenc as a basis or that was provided to Mr. Kolenc as a basis for the proposed removal?
>
> A It was directly in response to his assertion that the ticket was in fact dismissed in the reply to the proposal.
>
> Q Correct. You essentially were saying that I don't believe you, Mr. Kolenc. Because I know this other information. And that's – correct? You were saying that he was lying in the reply?
>
> A Yes.
>
> Q You were basing that upon information that you obtained through your administrative functions that was not provided to Mr. Kolenc prior to the proposed removal?
>
> A Absolutely. But that information was also provided prior to his response to the Agency indicating the ticket had in fact been dismissed.

IAF, Hearing Transcript at 91-92.

¶21 As in *Young,* the deciding official's receipt of ex parte information that the traffic ticket had been dismissed was more than just an inquiry under *Blank* "confirming and clarifying" information already in the record. *Young,* 706 F.3d at 1377. Rather, as the administrative judge concluded, the fact that the ticket had not been dismissed was considered significant by the deciding official because he referred to it in the decision letter and because he testified that it affected his findings regarding the appellant's credibility with regard to all of the charged misconduct. ID at 6; *see also Young*, 706 F.3d at 1376-77 (finding that the deciding official's consideration of ex parte communications related to credibility violated the first *Stone* factor). With regard to the second *Stone* factor, the deciding official plainly acknowledged that he did not provide the appellant with an opportunity to clarify or explain the discrepancy regarding whether the ticket had been dismissed. *See Young*, 706 F.3d at 1377 (finding that the appellant "had no opportunity to respond to the allegedly inconsistent statements" that were made to the deciding official in her ex parte inquiry and that "[t]his defect during the investigation stage more that satisfies the second *Stone*

factor."). Thus, we conclude that the administrative judge properly found that the appellant proved the first and second *Stone* factors.

¶22 With regard to the third *Stone* factor, the agency argues that the administrative judge erred in his determination on this issue because, while the deciding official admitted that ex parte communications influenced his decision, he also testified that he would not have removed the appellant on the basis of Charge 4 alone, that he was more concerned with the other three charges, and that he would have removed the appellant even in the absence of Charge 4. PFR File, Tab 1 at 9-10. Thus, the agency asserts that the ex parte communications did not exert undue pressure on the deciding official because the misconduct underlying Charge 4 had little relevance to his decision. *Id.* The agency also contends that the administrative judge erred in failing to make a credibility determination to resolve the deciding official's conflicting statements citing *Thomas* and *Hillen*. *Id.* at 10-11. However, unlike *Thomas,* the deciding official did not testify that he would have removed the appellant even if he had not received the ex parte communications. Rather, the deciding official admitted that the ex parte communication affected his view of the appellant's credibility. There is no indication in his testimony that he restricted the prejudice of the information solely to his resolution of Charge 4. Thus, the administrative judge did not err in failing to make a credibility determination under *Hillen* because the deciding official's statements do not appear to be contradictory. Furthermore, we note that the court recently clarified the weight to be given the third *Stone* factor of undue pressure. It stated that this factor is "less relevant" when the deciding official states that the ex parte information "influenced her determination." *Young*, 706 F.3d at 1377 (citing *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1280 n.2 (Fed. Cir. 2011)). Thus, the court observed that when the first *Stone* factor "strongly suggests" a due process violation, "any deficiency of the third factor is less significant." *Id.* We similarly find here that the third *Stone* factor is less significant, but that the strength of the first factor establishes that the appellant's

right to due process was violated by the deciding official's ex parte communications. Therefore, we affirm the initial decision.

ORDER

¶23 We ORDER the agency to cancel the removal action effective December 5, 2011. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶24 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶25 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶26 No later than 30 days after the agency tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶27 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶28 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § § 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.

DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

USDA UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.